MOGAN RAJ RAVI & ANOR v. PP & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
RHODZARIAH BUJANG JCA
MOHAMAD ZABIDIN MOHD DIAH JCA
RAVINTHRAN PARAMAGURU JCA
[CRIMINAL APPEALS NO: W-05(M)-431-09-2017,
W-05(M)-434-09-2017 & W-05(M)-435-09-2017]
20 JANUARY 2020

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused persons charged for four charges under ss. 6, 12(2) and 39B(2) of Dangerous Drugs Act 1952 and two under s. 8 of Firearms (Increased Penalties) Act 1971 – Whether charges proven – Trial judge invoked double presumptions under ss. 37(d) and 37(da)(vi) of Dangerous Drugs Act 1952 against accused persons – Whether elements of possession and trafficking proven – Whether invocation of double presumptions constitutional – Decision in Alma Nudo Atenza v. PP & Anor – Whether conviction safe – Whether ought to be set aside*

The appellants were arrested and later charged at the High Court for six charges; four under ss. 6, 12(2) and 39B(2) of the Dangerous Drugs Act 1952 ('DDA') and two under s. 8 of the Firearms (Increased Penalties) Act 1971 ('FA'). These charges were separately registered in three cases. The prosecution relied on the testimony of police personnel, PW2, who testified that the police had arrested one Murugaya, following suspicions that he was involved in certain drug-related activities, and found a set of keys in his trousers. The keys opened the door to a condominium unit ('unit 4') where methamphetamine, ecstasy pills and cannabis were found. The police then went to the back of unit 4 and, from its balcony, saw the appellants running into a room in unit 3. When the police's repeated knockings on the door went unanswered, they proceeded to enter into unit 3 by leaping from the balconies of unit 4 to unit 3. Once inside, the police found the appellants hiding and when asked whether they kept anything illegal, the appellants remained quiet. A search carried out on unit 3 led to the discovery of (i) various packets of cannabis in the kitchen cabinet; and (ii) pistols with ten bullets and a package containing 36 live bullets. The High Court Judge ('HCJ') found both the appellants had custody and control of the drugs and raised both the presumptions under ss. 37(d) and 37(da)(vi) of the DDA against them to prove the elements of possession and trafficking as required under the charge. In respect of the pistol and bullets, the HCJ based His Lordship's finding that they both had possession and knowledge of the same as the appellants (i) did not open the door when the police knocked; (ii) ran to the room when the police saw them from the balcony of unit 3;

(iii) hid in the room; and (iv) remained quiet, without denying, when queried whether there were incriminating items in the room. The HCJ also relied on the same set of evidence to find evidence of common intention between the appellants. Satisfied that the prosecution had established a *prima facie* case, the HCJ called the appellants to enter defence. The appellants denied any knowledge of the drugs, pistol and bullets found in unit 3 and testified that Murugaya was the actual culprit for he was in possession of unit 3 and the incriminating items found inside it. Murugaya was not called by the prosecution at the trial but was offered to the defence at the close of its case. However, Murugaya was missing. At the conclusion of the defence case, the HCJ found the appellants failed to rebut the two presumptions raised and equally failed to raise any reasonable doubt on the prosecution's case in respect of all the charges framed against them. Hence, the present appeal. The appellants centered their submissions around two issues, namely (i) the invocation of the double presumptions; and (ii) the failure of the HCJ to appreciate the defence case, basing on the arguments (a) that two witnesses, Murugaya and the police who jumped over the balconies of unit 4 to unit 3, were not called; and (b) of the consistency of the cautioned statements with their testimonies in court as evidence of the credibility of the defence.

Held (allowing appeal No. 431; dismissing appeal Nos. 434 & 435)
Per Rhodzariah Bujang JCA delivering the judgment of the court:

(1) It is the bounden duty of the prosecution to secure the attendance of witnesses once they are offered as witnesses to the defence. However, this must be tied to the efforts, or the lack of them, made by the prosecution to do that. In other words, adverse reference could not be raised simply on a failure *per se* to make an offered witness available to the defence and, in this case, it was no fault of the prosecution that such evidence was not presented to the court. The overwhelming evidence against the appellants qualified the exception that a conviction would be upheld despite a misdirection where the court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. (para 26)

(2) As for the policemen who leaped across the balcony, whose evidence would only corroborate that of PW2, it is trite that evidence must be weighed and not counted and this is exemplified by the clear provision of s. 134 of the Evidence Act 1950 ('Act'). Where the evidence of witness does not require corroboration, the prosecution is not obliged to tender such corroborative evidence because such a requirement would conflict with s. 134 of the Act. The testimony of a single witness, if believed, is sufficient to establish any fact. The HCJ had expressly stated that PW2 was a credible witness. There was no evidence to impute any

motive on PW2 to lie in court and implicate the appellants. The absence of the two policemen did not create any gap in the prosecution's case because it was only corroborative. No adverse inference should be drawn against the prosecution as there was no suppression or withholding of the evidence. (paras 21, 29, 30 & 32)

(3) In their cautioned statements, the appellants merely stated that they were arrested in unit 4, and not unit 3, and that unit 3 was opened with keys obtained from Murugaya who was arrested earlier with them. They never mentioned, as per their sworn testimonies, that Murugaya rented unit 3 for his uncle, which differed from the version put during the prosecution's case, which was that Murugaya rented the unit. The best person to testify about the actual tenant for unit 3 would be the estate agent ('PW5') but the alleged fact was not put to him. (para 33)

(4) From the credible evidence of PW2, the conduct of the two appellants refusing to open the door to unit 3, despite PW2's repeated knockings as well as hiding beside the bed in the room after knowing the police were attempting to gain entry into unit 3, could not raise any other inference but that of guilt. The relevancy of such conduct, which was not explained by the appellants, was applicable in this case. (para 34)

(5) In view of the invocation of the double presumptions, which had been ruled unconstitutional in *Alma Nudo Altenza v PP & Anor*, the convictions on the drugs trafficking charges were set aside and substituted with one under s. 6 of the DDA. In their mitigation, the appellants submitted that (i) the appellants had no previous convictions; (ii) the first appellant was only 27 years old with aged parents and a sister who was still studying; and (iii) the second appellant, too, had aged parents to support along with a wife and two young children. Based on their mitigation, the appellants were each sentenced to 15 years imprisonment and ten strokes of rotan for the first charge and eight years and ten strokes of rotan for the second charge. Both sentences were ordered to run concurrently and with that imposed in Appeal No. 434 but consecutive to that imposed for the possession of the pistol and bullets in Appeal No. 435 because there were distinct offences although the discovery of the offences were made at the same time. Appeal No. 431, in respect of the drug trafficking charges, were allowed while the other two were dismissed. The decision of the HCJ was affirmed. (paras 37 & 38)

Case(s) referred to:
Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***
Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***
Amala Johnson lwn. PP [2019] 1 LNS 140 CA ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chew Wai Keong & Anor v. PP & Another Appeal [2018] 3 CLJ 681 FC ***(refd)***
Gade Laksmi Mangaraju v. State of Andra Pradish AIR [2007] SC 2677 ***(refd)***
Ghazalee Kassim & Ors v. PP [2009] 4 CLJ 737 FC ***(refd)***
Lai Kim Hon & Ors v. PP [1980] 1 LNS 197 FC ***(refd)***
Md Zainudin Raujan v. PP [2013] 4 CLJ 21 FC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Asnawi Yusuf [2012] 3 CLJ 41 CA ***(refd)***
PP v. Denish Mahavan [2009] 2 CLJ 209 FC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 60(1), 92(1), 134
Dangerous Drugs Act 1952, ss. 6, 37(d), 37(da)(vi), 39A(2)
Evidence Act 1950, s. 114(g)

(Criminal Appeals No: W-05(M)-431-09-2017, W-05(M)-434-09-2017 & W-05(M)-435-09-2017)

For the 1st & 2nd appellants - Gooi Soon Seng & Ooi Pen Lyn; M/s Gooi & Azura
For the respondent - Dhiya Syazwani Izyan Mohd Akhir; DPP

[Editor's note: For the High Court judgment, please see PP lwn. Mogan Raj Ravi & Satu Lagi [2017] 1 LNS 1464 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Rhodzariah Bujang JCA:

[1] The two appellants in all the three appeals listed above were charged and convicted of a total of six charges, four under the Dangerous Drugs Act 1952 ("DDA") and two under the Firearms (Increased Penalties) Act 1971 ("Firearms Act") which were separately registered in three cases. Hence, the three appeals now before us. The details of the charges and registration numbers here and below are as follows:

(i) Appeal No. W-05(M)-431-09-2017/45A-86-12-2016

Pertuduhan Pertama

Bahawa kamu bersama-sama pada 17/05/2016 jam lebih kurang 3.45 petang di rumah bernombor 3, tingkat 23, Duta Ria Kondominium, Jalan Dutamas Raya, dalam Daerah Sentul, Wilayah Persekutuan Kuala Lumpur, didapati telah mengedar dadah berbahaya jenis cannabis berat 12,744 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan

di bawah Seksyen 39B (1) (a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B (2) Akta yang sama dibaca bersama Sek 34 Kanun Keseksaan.

Pertuduhan Kedua

Bahawa kamu bersama-sama pada 17/05/2016 jam lebih kurang 3.45 petang di rumah bernombor 3, tingkat 23, Duta Ria Kondominium, Jalan Dutamas Raya, dalam Daerah Sentul, Wilayah Persekutuan Kuala Lumpur, didapati telah mengedar dadah berbahaya jenis cannabis berat 470 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 39B (1) (a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B (2) Akta yang sama dibaca bersama Sek 34 Kanun Keseksaan.

(ii) Appeal No. W-05(M)-434-09-2017/45-34-05-2017

Pertuduhan Pertama

Bahawa kamu bersama-sama pada 17/05/2016 lebih kurang jam 03.45 petang bertempat di rumah bernombor 3, tingkat 23, Duta Ria Kondominium, Jalan Dutamas Raya, dalam Daerah Sentul, dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan telah didapati dalam milikan kamu dadah merbahaya iaitu heroin dan monoacetylmorphines (berat bersih) 3.61 gram. Oleh itu kamu telah melakukan satu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39A (1) Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

Pertuduhan Kedua

Bahawa kamu bersama-sama pada 17/05/2016 lebih kurang jam 03.45 petang bertempat di rumah bernombor 3, tingkat 23, Duta Ria Kondominium, Jalan Dutamas Raya, dalam Daerah Sentul di dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan telah didapati didalam milikan kamu dadah berbahaya iaitu cannabis (berat bersih) 17.61 gram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 6 Akta Dadah Berbahawa 1952 dan boleh dihukum di bawah Seksyen yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

(iii) Appeal No. W-05(M)-435-09-2017/45-35-05-2017

Pertuduhan Pertama

Bahawa kamu bersama-sama pada 17/05/2016 jam lebih kurang 3.45 petang di rumah bernombor 3, tingkat 23, Duta Ria Kondominium, Jalan Dutamas Raya, dalam Daerah Sentul, Wilayah Persekutuan Kuala Lumpur, di dapati dalam milikan kamu terdapat senjata api iaitu sepucuk pistol jenis GLOCK 19 GEN 4 MADE IN AUSTRIA – Nombor siri SRN 245 yang di simpan di atas siling bilik air di dalam bilik tidur utama. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 8 Akta Senjata Api (Penalti lebih berat) 1971 dibaca bersama Sek 34 Kanun Keseksaan.

Pertuduhan Kedua

Bahawa kamu bersama-sama pada 17/05/2016 jam lebih kurang 3.45 petang di rumah bernombor 3, tingkat 23, Duta Ria Kondominium, Jalan Dutamas Raya, dalam Daerah Sentul, Wilayah Persekutuan Kuala Lumpur, telah melakukan kesalahan memiliki amunisi, iaitu satu kelopak peluru warna hitam mengandungi 10 butir peluru hidup jenis 9mm LUGER jenis AP 14 dan 36 butir peluru hidup jenis 9mm LUGER jenis AP 14 yang dibungkus dalam plastik warna merah jambu yang disimpan di atas siling bilik air di dalam bilik tidur utama. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 8(a) Akta Senjata 1960 (Akta 206) yang boleh dihukum di bawah Seksyen 8 Akta yang sama dibaca bersama Sek 34 Kanun Keseksaan.

[2] For the first appeal, the appellants were sentenced to death in respect of both charges. For the second appeal, it was four years' imprisonment for the first charge and two years' imprisonment for the second charge. In respect of the third appeal, it was ten years imprisonment for the first charge and five years' imprisonment for the second charge. All imprisonment terms were ordered to run from the date of arrest by the learned High Court Judge (HCJ).

[3] We heard the three appeals on 18 November 2019 and affirmed the convictions and sentences passed by His Lordship in respect of the second and the third appeals except on the effective dates of the imprisonment terms. However, for the first appeal, we substituted both convictions with that of possession under s. 6 of the DDA which is punishable under s. 39A(2) and sentenced each of the appellants to 15 years and ten strokes of the rotan for the first charge and eight years and ten strokes of the rotan for the second charge to take effect from the date of arrest and to run concurrently with the sentences passed in the second appeal but consecutive to those passed in the third appeal. Both appellants as well as the respondent (Public Prosecutor) are aggrieved with our decision and have filed their respective notices of appeal against it. That of the Public Prosecutor was only against both the sentences that we passed in respect of the substituted convictions in the first appeal.

The Prosecution Case

[4] The discovery of the drugs, pistol and bullets which led to the arrests of the two appellants in a condominium unit in Duta Ria Condominium as stated in the charge, which we would henceforth refer to as unit 3, was precipitated by the arrest of one Murugaya a/l Raguvathy ("Murugaya") by a team of police personnel led by ASP Shaiful Hezreen bin Shahriman (PW2). The detention of Murugaya was at the carpark of the said condominium whilst he was in a Perodua Myvi car with registration number W3232Q and PW2 did so based on information received on drug activities of a suspect using that car. After his arrest, PW2 and his team were led by

Murugaya to his condominium unit (unit 4) which was on the same floor as that of unit 3, that is, the 23rd floor and which is right beside it. This was after PW2 found a set of keys in Murugaya's right trouser pocket. From their raid in that unit 4, PW2 found four packets of methamphetamine, one packet containing suspected two ecstasy pills and one packet of suspected cannabis. A tenancy agreement for unit 3 was also found there which aroused PW2's suspicion and prompted him to go over and knocked on its door a few times. When that went unanswered, he went back to unit 4 and from the balcony of that unit 4 (which he described as a 'corridor' in his evidence) he saw two men running into a room in unit 3. PW2 then ordered two of his men, Lance Corporal Danial and Constable Khairul Izwan to leap over from the said balcony of unit 4 to unit 3 which they did. Thereafter, Constable Khairul Izwan proceeded to open the door to unit 3 for PW2 and the rest of their team to enter.

[5] PW2 then went to the very room that he saw the two men entering which was the master bedroom and found both the appellants hiding at the side of the bed there. When asked by PW2 whether they kept anything illegal in unit 3, they both kept quiet. Their subsequent check of unit 3 disclosed the drugs as per the charges above at the following places:

(i) A box in the kitchen cabinet containing:

  (a) four 'ikatan gelang getah' with each 'ikatan' containing ten plastic packets of cannabis.

  (b) one 'ikatan gelang getah' with seven plastic packets of cannabis.

(ii) A bag brand 'CONVERSE' below the first door of the kitchen cabinet with ten slabs of cannabis;

(iii) A bag containing four plastic packets with the words 'Sky Net' written on the packets containing slabs of cannabis; and

(iv) Two plastic packets of heroin and two plastic packets of slabs of cannabis.

[6] In the ceiling of the toilet in the said master bedroom of unit 3 were found the pistol with the ten bullets and a package containing the 36 live bullets, which were the subject matter of the charges under the Firearms Act. The pistol upon examination by Insp. Mohd Riyad Solehin Abd Rahim (PW10) was found to be serviceable.

[7] Other than the above evidence, the prosecution also relied on the evidence of PW2 who testified that a set of keys which includes that to the main door of unit 3 were found in the trouser's pocket of each of the appellants and from the second appellant, the access card to the condominium complex was also found with his set of keys. The second

appellant's set of keys includes one for the master bedroom and two other rooms in unit 3. Further evidence tendered against the second appellant came from the testimony of the chemist, Nurul Hamizan Abdul Hamid (PW11) who said the second appellant's DNA was found on a toothbrush (exh. P57(7)) and a towel (exh. P57(1)) and where for that latter item he was the main contributor. Both these items were seized from unit 3 by Detective Sargent Mohamad from the Forensic Unit. As for the first appellant, the prosecution also relied on the discovery of two bank account books from CIMB Bank found on the dressing table in the master bedroom and a bank statement in his name in a bag found on a table next to the window in the said bedroom.

[8] The prosecution also called one Jasmit Kaur (PW4), Liew Lai Beng (PW5) and Choon Hoong (PW7) to testify against the two appellants. PW4 was legally the tenant for unit 3 and a tenancy agreement (exh. P17B) was tendered as evidence by the prosecution. The landlord was one Mohammad Azmi bin Mohd Dahlan. However PW4 denied that she signed on that agreement although she confirmed that her identity card number and name on the agreement are correct. She said she had given a photocopy of her identity card to the first appellant in order to borrow RM2,000 for her husband's treatment at Institut Jantung Negara. PW5 was the estate agent who prepared the tenancy agreement and testified that he dealt with the first appellant who wanted to rent unit 3 for his staff and later gave him a photocopy of PW4's identity card. He said he passed five sets of unit 3's keys to the first appellant including the front door key. A photograph of five sets of keys and access card is also attached to the agreement (see pp. 65-66 of the appeal record vol. 3) which supports PW5's further evidence about the handing over of the keys with the tenancy agreement to the first appellant. He also said he never met PW4 despite his repeated request to the first appellant to do so and it was the first appellant who handed exh. P17B to him after the purported execution by PW4. PW5 also said the landlord was in Philippines at that time and one Yeow Guat Lee (PW8) signed on behalf of the landlord based on a letter of authorisation from him.

[9] As for PW7, he testified that at that material time, he stayed on the same 23rd floor of the condominium but the sixth unit which was right in front of the unit 3 and 4. His evidence is that he had seen the two appellants going in and out of unit 3 and 4 but could not confirm if they both stayed in that unit 3.

[10] Based on the aforesaid evidence, the learned HCJ found both the appellants had custody and control of the drugs as stated in the charge and raised both the presumptions under s. 37(d) and 37(da)(vi) of DDA against them to prove the elements of possession and trafficking as required under the charge.

[11] In respect of the pistol and bullets, His Lordship based his finding that they both had possession and knowledge of the same because of these four facts:

(i) OKT1 and OKT2 tidak membuka pintu utama unit 23-3 apabila diketuk oleh pihak polis.

(ii) OKT1 dan OKT2 berlari ke bilik tidur apabila SP2 menjenguk dari koridor luar unit 23-3.

(iii) OKT1 and OKT2 bersembunyi di tepi katil dalam bilik tidur utama unit 23-3 berkenaan.

(iv) OKT1 dan OKT2 hanya berdiam diri apabila ditanya sama ada terdapat barang salah dalam rumah tersebut tanpa menafikannya.

[12] The learned HCJ also used the same evidence as stated above to find evidence of common intention against them and in para. [26] of his judgment, His Lordship stated clearly that he was not relying on the DNA evidence tendered at the trial because the forensic officer who took the samples for the DNA test was not called to give evidence. His Lordship also dealt with the contradictions in the evidence of PW5, PW9, PW2 and PW4 raised by the defence at paras. [32]-[37] of his judgment and found that the said contradictions were not material so as to affect the credibility of the witnesses. Thus, the learned HCJ ruled that a *prima facie* case has been made out by the prosecution against both appellants.

The Defence

[13] Both the appellants gave sworn evidence and tendered their caution statements (exhs. D76 and D77 respectively). Their common defence is that both were staying in unit 4 with Murugaya who was the first appellant's sales manager in the rental car company, MS Carworld owned by the appellants. The first appellant stayed in the master bedroom with his girlfriend, Renuka Devi (DW3) and the second appellant and Murugaya in the other two rooms, respectively. The second appellant said he paid the first appellant RM500 per month as rental for his room. On the day in question, both of them were in unit 4 when the police brought Murugaya to the said unit 3 and then all of them were brought to unit 3 which was rented by Murugaya for his uncle after one of the policemen found the key to unit 3 in Murugaya's room. The first appellant also claimed that his two CIMB Bank books and bank statement were found in his room in unit 4 and not in unit 3 as testified by PW9. The tenancy agreement for unit 3 was in fact found on the table in unit 3 and not in unit 4, said the appellants.

[14] Both appellants denied any knowledge of the drugs, pistol and bullets found in unit 3 and testified that Murugaya told them that if they each pay RM200,000 they could be released and Murugaya's uncle, whom the first appellant said had once in a while visited unit 3 as told to him by Murugaya,

could help to facilitate the said release. DW3, corroborated their evidence above and said as did the appellants that in 2015, Murugaya's uncle did stay in unit 3 for a week with his family during the school holidays. In short, their defence is that Murugaya was the actual culprit for he was in possession of unit 3 and hence all the drugs, pistol and bullets found therein.

[15] We pause here to note that Murugaya was not called by the prosecution at the trial but offered to the defence at the close of its case. However, they failed to produce him when the defence accepted the offer because he was missing. We noted from p. 116 of the appeal record titled 'Rekod Rayuan Tambahan (nota keterangan)', it was recorded that after learned counsel for the appellants raised the issue that Murugaya was not made available to them, the learned Deputy Public Prosecutor ("DPP") wanted to recall PW9 to explain the actions he had taken on this but this request was refused by the learned HCJ. However, in his judgment, the learned HCJ specifically considered the absence of Murugaya and held at para. [65] that the undeniable fact is that Murugaya was never in unit 3 when the police raided the place. Then in paras. [67]-[69] His Lordship said as follows:

> [67] Sehubungan itu, bagi saya, jika Murugaya dapat dikemukakan, keterangan membantu OKT1 dan OKT2 yang besar kemungkinan dinyatakan oleh beliau antaranya adalah:
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> (i) OKT1 dan OKT2 ada di unit 23-4 semasa serbuan dibuat oleh pihak polis dan bukan di unit 23-3.
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> (ii) Murugaya menyewa unit 23-3 untuk **pakciknya**.
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> (iii) Kunci unit 23-3 tersebut ada pada Murugaya yang diambil oleh polis dari biliknya semasa serbuan di unit 23-4.
>
> [68] Pada pandangan saya, isu-isu ini telah dihuraikan sebelum ini berdasarkan keterangan yang dikemukakan oleh OKT1 dan OKT2 dalam pembelaan mereka dan dapatan saya, ianya bertentangan dengan keterangan yang ada dan dapatan fakta telah dibuat berhubung isu-isu berkenaan.
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> [69] Sehubungan itu juga, keterangan Murugaya jika hadir memberi keterangan tidak dapat membantu kes pembelaan untuk menimbulkan keraguan yang munasabah terhadap kes pendakwaan. Oleh itu juga, kegagalan pendakwaan mengemukakan saksi Murugaya ke mahkamah tidak memprejudis kes pembelaan.
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> Tambahan pula, mahkamah telah dimaklumkan bahawa Murugaya tidak dapat dikesan untuk dibawa ke Mahkamah.

[16] As for the defence, after due consideration of the evidence, the learned HCJ found that both appellants have failed to rebut the two presumptions raised by His Lordship and equally failed to raise any reasonable doubt on the prosecution's case in respect of all the charges framed against them. His Lordship's reasons for that conclusion as stated by him in para. [66] are as follows:

> [66] Asas dapatan saya ini berasaskan keterangan saksi-saksi pendakwaan dan seterusnya keseluruhan keterangan setelah pihak pembelaan memberi keterangan. Dapatan saya antara lain adalah:
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> (i) Ketua serbuan (SP2) adalah saksi yang kredible.
>
> (ii) Kelibat OKT 1 dan OKT2 dilihat dari koridor luar unit 23-4, berlari ke dalam bilik di rumah unit 23-3.
>
> (iii) OKT1 dan OKT2 kemudian ditemui bersembunyi di dalam bilik tidur utama unit 23-3 setelah sebelum itu pintu unit 23-3 tersebut tidak dibuka apabila diketuk oleh pihak polis.
>
> (iv) OKT1 yang menyewa unit 23-3 atas nama SP4 yang mana SP4 tiada pengetahuan mengenainya dan kad pengenalan SP4 telah digunakan untuk penyewaan unit ini.
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> (v) Kunci unit 23-3 juga dirampas dari poket seluar OKT1 dan OKT2 semasa ditahan di unit 23-3 berkenaan di samping 2 buku bank CIMB dan penyata akaun OKT1 ditemui di dalam unit 23-3 oleh pegawai penyiasat, SP9.
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> (vi) Keterangan bahawa OKT1 dan OKT2 tiada di unit 23-3 semasa serbuan dibuat tidak dapat diterima berasaskan keseluruhan keterangan. Saya juga telah mempertimbangkan pernyataan beramaran kedua-dua OKT iaitu D76 dan D77 dan dapatan saya berdasarkan keseluruhan keterangan adalah pembelaan OKT1 dan OKT2 ini menjurus kepada penafian bahawa mereka tidak berada di unit 23-3 ketika pihak polis membuat serbuan.

[17] The learned HCJ in his earlier consideration at para. [56] has held that the evidence of PW2 seeing a glimpse of two persons running to the room in unit 3 is not inherently improbable and that there was no reason for PW2 to make up his evidence to frame both appellants. He was just doing his job as a police officer to curb drug activities and the defence of both appellants that the police were not in unit 3 was a mere denial.

[18] Further, said His Lordship, their contention that unit 3 was rented for Murugaya's uncle was never brought up during the prosecution case but only in the defence. His Lordship then scrutinised the material aspect of PW4's and PW5's evidence as stated earlier and held that as uninterested witnesses they have no reason to fabricate their evidence against the appellants.

A

The Appeal

[19] Before us, learned counsel for the appellants centered his submission on two main issues, that is, the invocation of the double presumptions and the failure of the learned HCJ to appreciate the defence case. In connection with that latter issue, learned counsel highlighted to us the respondent's
B failure to make available Murugaya to them to be called as their witness and another failure to call the two named policemen who jumped over the balcony of unit 4 to unit 3. The consistency of the caution statements of both appellants exh. D76 and exh. D77 respectively appearing at pp. 186 to 189 of vol. 3 of the appeal record with their testimonies in court was also
C highlighted to us as evidence of the credibility of the defence. We would start our consideration with this last issue first.

Consideration Of The Defence

[20] As stated earlier, the crux of the defence is that the appellants were
D arrested in unit 4, not unit 3, and had nothing to do with that unit 3. Also as narrated earlier, in their respective testimonies, the appellants said that it was Murugaya who rented that unit 3 for his uncle who visited it once in a while and who even stayed there one week in 2015. In other words, the evidence of PW2 implicating them was totally fabricated.

E **[21]** With respect, we could not find the evidence to impute any motive on PW2 to lie in court and implicate the two appellants. The learned HCJ who had the audio-visual advantage which we do not possess had made a specific finding on his credibility and we have no reason to disparage that finding of His Lordship. As held by the Federal Court in *Lai Kim Hon & Ors v. Public*
F *Prosecutor* [1980] 1 LNS 197; [1981] 1 MLJ 84:

> The principle of law governing appeals in criminal cases on questions of fact is well established, in that the Appeal Court will not interfere unless the balance of evidence is grossly against the conviction especially upon a finding of a specific fact involving the evaluation of the evidence of a witness founded on the credibility of such witness.

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[22] This caution was also reiterated by the Federal Court in *Chew Wai Keong & Anor v. PP & Another Appeal* [2018] 3 CLJ 681 where the court held as follows:

> It is trite law that the view of the trial judge as to the credibility of a
H witness must be given proper weight and consideration. An appellate court should be slow in disturbing such finding of fact arrived at by a trial judge, who had the advantage of seeing and hearing the witness, unless there were substantial and compelling reasons for disagreeing. (per Hasan Lah FCJ in *Amri Ibrahim & Anor v. PP* [2017] 1 CLJ 617).

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[23] Furthermore, there is authority from our apex court in *Md Zainudin Raujan v. PP* [2013] 4 CLJ 21 which affirmed a drug trafficking conviction based on the sole testimony of a police witness, PW5 whom the trial judge had found to be a credible witness and whose evidence, held the Federal Court is not required by law to be corroborated. Given the same circumstance in this case before us, including the non-calling of other police witnesses present at the scene, we are moved to apply the *ratio decidendi* in the said case on the assessment and credibility of a witness here.

[24] As for the failure to call Murugaya and the two policemen who jumped from unit 4 to unit 3 (particularly in respect of Murugaya), which according to the appellants' petition of appeal raises an adverse inference under s. 114(g) of the Evidence Act 1950 against the respondent, it is salutary to remember that the Supreme Court in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492 have stated that the invocation of that section is only when there has been withholding or suppression of the evidence and not merely for failure to adduce such evidence. Further, it is the prosecutorial discretion on which witness it should call to prove its case against an accused beyond reasonable doubt as held by the same court in *Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19; [1985] 2 MLJ 16. As was further elucidated in *Ghazalee Kassim & Ors v. PP* [2009] 4 CLJ 737:

> [19] The court will only invoke s. 114(g) of the Evidence Act for failure to call a witness if it is of the opinion that the prosecution does so to withhold or suppress evidence which, if produced could be construed against the prosecution or otherwise in favour of the accused. The prosecution can also, in the alternative, offer to the defence any witness which they do not wish to call. As to which witness the prosecution chooses to call is entirely up to them. *Calling a wrong witness may be detrimental to their case. The same goes if they fail to call a material witness. This is where s. 114(g) of the Evidence Act may be invoked by the court.*
>
> (emphasis added)

[25] The learned DPP submitted and we do agree with her that Murugaya is not a material witness for them because he was not arrested in unit 3 although going by the defence he was crucial to theirs because as stated by the learned HCJ, Murugaya's evidence may corroborate their defence that both appellants were arrested in unit 4, that Murugaya rented unit 3 for his uncle and unit 3 was opened with a key obtained from him. Learned counsel for the appellants in his oral submission before us said that there was no attempt made to trace him which we could not agree because his absence at the trial would have been satisfactorily explained had the learned HCJ allowed the recall of PW9 do so which regrettably was not done but which rejection, in our view does not impact negatively on the prosecution's case.

[26] In saying this, we appreciate learned counsel's submission based on this court's decision in *PP v. Asnawi Yusuf* [2012] 3 CLJ 41; [2011] 4 MLJ 16 where it was held that "it is the bounden duty of the prosecution to secure the attendance of witnesses once they were offered as witnesses to the defence." However, this must be tied to the efforts (or the lack of them) made by the prosecution to do that. In other words, that adverse reference could not be raised simply on a failure *per se* to make an offered witness available to the defence and in this case before us it was no fault of the prosecution that such evidence was not presented to the court. The refusal by the learned HCJ to recall PW9 to explain his efforts to trace Murugaya may amount to a misdirection but the Federal Court in *Tunde Apatira & Ors. v Public Prosecutor* [2001] 1 CLJ 381 held, after considering the proviso to s. 92(1) of the Courts of Judicature Act 1964 which is in *pari materia* with that under s. 60(1) of the same Act and applicable to the Court of Appeal, as follows:

> The expression "miscarriage of justice" appears in the proviso to s. 92(1) of the Courts of Judicature Act 1964. A similar expression, "failure of justice" appears in s. 422 of the Criminal Procedure Code. They mean the same thing. For, the same result follows when justice either fails or miscarries. The proviso reads as follows:
>
> > Provided that the Federal Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.
>
> So it comes to this. As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, *a conviction will be upheld despite a misdirection where this court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction.* The decision of this court in *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705 exemplifies the general rule, while that in *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151 illustrates the exception. Having scrutinised the record with care, we are satisfied that this is an appropriate case for the application of the proviso. (emphasis added).

Based on our consideration of the overwhelming evidence against the appellants in this case, it qualifies as an exception mentioned by the Federal Court above.

[27] As for not being supplied with Murugaya's statement, we noted from the notes of proceeding at p. 116 of the supplementary appeal record titled "Rekod Rayuan Tambahan (nota keterangan)" learned counsel for the appellants did complain of the same and said as follows:

> PB: I would like to record that prosecution offered 3 witnesses, one is Murugaya, Renuka and one more is manager from their management who has in fact already left the Condominium Management. We would like put on record that this in spite the fact

> that Murugaya was offered to the defence but never made available to the defence at any stage and neither was his statement supply or shown to defence. And with that YA the defense close their case.

[28] With respect, as clearly noted above, learned counsel for the appellants never said that he had requested for the said statement but was not given the same and neither did he expressed an intention to tender the same, of course upon sight of it, which he was fully entitled to do through PW9 by recalling him to the stand.

[29] As for the two policemen who leaped across the balcony, whose evidence in our view would only corroborate that of PW2, it is trite law that evidence must be weighed and not counted and this is exemplified by the clear provision of s. 134 of the Evidence Act 1950 which provides:

> 134. No particular number of witness shall in any case be required for the proof of any fact.

[30] The Federal Court in *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301 had clearly stated that where the evidence of a witness does not require corroboration, the prosecution is not obliged to tender such corroborative evidence because such requirements would conflict with the said s. 134. Therefore, held the Federal Court, the testimony of a single witness, if believe, is sufficient to establish any fact. Here in this case before us, the learned HCJ as stated earlier had expressly stated that PW2 was a credible witness. Further, the learned DPP in her reply informed the court that the two policemen were in fact offered to the defence which learned counsel never refuted in his final reply submission.

[31] Learned counsel also questioned the improbability of that act being done at the height of 23 floors and 5 feet between the two balconies. However, when we examined the cross-examination of PW9 on this issue, it was only put to him that it was dangerous to jump from one balcony to the other, which he agreed and not that it was an improbable or an impossible act. That evidence at p. 20 of the same appeal record (nota keterangan) reads:

> S. Setuju rumah 23-3 dan 23-4 di tingkat 23?
>
> J. Setuju.
>
> S. Ikut kamu balkoni antara rumah lebih kurang 5 kaki?
>
> J. Setuju.
>
> S. Setuju amat bahaya untuk melompat dari satu balkoni ke balkoni lain di tingkat 23?
>
> J. Ya.

Subsequently, at p. 26 of the same volume it was put to PW9 that no such act of leaping from the balcony happened. However, in re-examination at p. 27, PW9 explained himself as follows:

> S. Tadi dicadang bahaya untuk lompat koridor kamu setuju tapi kamu arah untuk lompat kenapa?
>
> J. Sebab jarak dekat dan saya pilih anggota yang berbadan kecil dan ringan untuk lompat.

[32] Given the above facts and the offering of the two policemen to the defence, we would agree with the learned DPP that their absence did not create any gap in the prosecution case because their evidence was only corroborative of that of PW9 and no adverse inference should be drawn against the prosecution based on the same reason earlier stated which is that there was no suppression or withholding of the evidence.

The Caution Statements

[33] In both their cautioned statements, the two appellants merely state that they were arrested in unit 4 and not unit 3 and that unit 3 was opened with keys obtained from Murugaya who was arrested earlier than them. They never mentioned as per their sworn testimonies that Murugaya rented unit 3 for his uncle which we must now stress is different from the version put during the prosecution case which is that Murugaya rented the unit. As again rightly pointed out by the learned DPP, the best person to testify about the actual tenant for unit 3 would be PW5, the estate agent who dealt with the tenancy agreement but that alleged fact was not put to him. As also highlighted by the learned DPP and this was similarly done in the court below, the defence itself said Murugaya's uncle stayed there with his family only for one week in 2015 though he visited the place on and off. Whereas the evidence of PW7 is clear that both appellants have been seen by him coming in and out of unit 3 also. Although DW3 also frequented unit 3, all these facts do not impinge on the finding of possession against the two appellants because, firstly the law as decided by the Federal Court in *PP v. Denish Mahavan* [2009] 2 CLJ 209 is that there need not be exclusive possession of the premises where the drugs are found in order to establish possession of the drugs. The court held at para. [16] as follows:

> [16] Before proceeding to consider the reasons for the Court of Appeal's decision, we will say a few words about "exclusive" possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. *To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in case where possession is entirely with one person – that is, "exclusive" – that a conviction is possible.* (emphasis added)

[34] Here, from the credible evidence of PW2, the conduct of the two appellants refusing to open the door to unit 3 despite PW2's repeated knockings as well as hiding beside the bed in the master bedroom after knowing that the police were attempting to gain entry into unit 3 could not raise any other inference but that of guilt. The Federal Court's decision in *Parlan Dadeh v. PP* [2009] 1 CLJ 717 on the relevancy of such conduct which was not explained by the appellants is applicable in this case.

[35] In saying all the above, we do not dispute the evidence as alluded by the defence that the two appellants were actually residing in unit 4 because even if they did, the fact of their residence does not negate their possession of the drugs, the pistol and bullets found in unit 3 for it is not a requirement of the law that they must reside there in order to satisfy that element of possession under the DDA and the Firearms Act. The elements to prove possession are after all custody and control as well as knowledge and as narrated earlier, the evidence of PW5 and PW7 when considered together with their possession of the keys to unit 3 and the CIMB documents in the first appellant's name shows that unit 3 was accessible to the appellants.

[36] Lastly, also in relation to the issue of access, learned counsel highlighted to us the evidence adduced at the trial from PW9 as per p. 73 of the appeal record (nota keterangan) that 25 fingerprints were lifted from the impugned exhibits tendered in court and until the day he gave evidence in court, there was no result obtained whose fingerprints were these. The learned DPP agreed that this was so but countered that submission by saying that it was never put to PW9 that Murugaya's fingerprint was one of the said 25. Given their defence that Murugaya was the real culprit in this case, the presence of his, or his uncle's fingerprint for that matter, should have indeed been put to the witness. Nonetheless, case authorities are clear that fingerprint evidence is only corroborative evidence. This was held by the Supreme Court of India in *Gade Laksmi Mangaraju v. State of Andra Pradish* AIR [2007] Supreme Court 2677 and quoted in this court's decision in *Amala Johnson v. PP* [2019] 1 LNS 140; [2019] MLJU 128 which also referred to the Supreme Court's decision in *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233 where Chang Siew Fai (CJ Sabah and Sarawak) held it was only where the identity of a culprit is in question or is required to be proved would finger print evidence be a great significance and value. In view of the clear evidence in this case based on the testimony of PW2 on the arrest of the appellants and the discovery of the drugs, pistol and bullets, as well as the evidence of PW5, PW7 and PW11, that fingerprint evidence is to us of no significance for without the said evidence the appellants have been proved to be in legal possession of both the drugs, pistol and bullets found in unit 3.

A **Double Presumptions And Sentences**

[37] However, in view of the invocation of the double presumptions which has been ruled unconstitutional in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780, we have decided to set aside the convictions on the drug trafficking charges and substitute the same under s. 6 of the DDA. Upon
B hearing submissions from both parties and considering their mitigation, *to wit*, both appellants have no previous convictions, that the first appellant was only 27 years old at the material time with aged parents and a sister still studying whereas the second appellant has a wife with two young children (aged nine and five respectively) as well as aged parents to support, we
C decided to impose a sentence of 15 years imprisonment and ten strokes of the rotan for the first charge and eight years plus ten strokes of the rotan for the second charge. Both sentences were ordered to run concurrently and with that imposed in Appeal No. 434 but consecutive to that imposed for the possession of the pistol and bullets in Appeal No. 435 because these are
D distinct offences although the discovery of the offences were made at the same time.

[38] Thus Appeal No. 431 in respect of the drug trafficking charges were allowed whereas the other two were dismissed and the decision of the learned HCJ in respect of them was affirmed.

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